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15 **UNITED STATES DISTRICT COURT**
16 **DISTRICT OF ARIZONA**

17 United States of America,
18 Plaintiff/Respondent,
19 v.
20 Abdul Malik Abdul Kareem,
21 Defendant/Movant.

2:15-cr-00707-SRB

**DEFENDANT'S OJECTIONS TO
THE DRAFT PRESENTENCE
REPORT**

22 Defendant, Abdul Malik Abdul Kareem ("Abdul Kareem"), through his
23 undersigned counsel, makes the following objections concerning the Draft Presentence
24 Investigative Report ("DPSR") that was prepared on September 13, 2021.

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1 against him nor was he placed in a higher security facility which would have been
2 standard procedure if the allegations had been believed. It should be modified to reflect
3 those undisputed facts.

4 **Count Group 1: Conspiracy to Provide Material Support or Resources to a**
5 **Designated Foreign Terrorist Organization (Counts 1, 3 and 5).**

6 ¶ 36 **Base Offense Level**, Abdul Kareem objects to the DPSR writer concluding
7 that the base offense level is 38 for the following reasons. Pursuant to USSG § 2M5.3(a),
8 the base offense level is 26. If the offense involved dangerous weapons then there is an
9 increase by two levels (2M5.3(b)(1)) taking it to a base level of 28. The DPSR writer
10 imposes a base level 38 because of the death of Simpson and Soofi since the cross-
11 reference under 2M5.3(c) states “[i]f the offense resulted in death apply § 2A1.1 (First
12 Degree Murder) if the death was caused intentionally or knowingly, or § 2A1.2 (Second
13 Degree Murder).

14 In § 2A1.1, murder is defined under 18 U.S.C. § 1111. First-degree murder under
15 federal law requires: (1) an unlawful killing; (2) with malice aforethought; (3) specific
16 intent: deliberate, malicious, willful premeditation; and (4) that the killing occur within
17 the special maritime and territorial jurisdiction of the United States. 18 U.S.C. § 1111.
18 These elements are not present in this case. The offense resulted in the death of the
19 perpetrators; *i.e.*, Simpson and Soofi. The Guideline contemplates the death of one who
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1 is not a perpetrator or co-co-conspirator. The death of Simpson and Soofi do not
2 constitute murder.

3 If the court were to consider this as felony murder pursuant to 18 U.S.C. § 1111,
4 which it is not since it results in the death of the perpetrators, a downward adjustment
5 would be proper since Abdul Kareem did not cause the death intentionally or knowingly,
6 Application Note 2(B). The Guideline does not contemplate a sentence for murder when
7 the persons who are killed are the perpetrators and not victims.
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9 Additionally, the DPSR writer errs in applying this cross-reference under the facts
10 of this case. In *United States v. Felton*, 166 Fed.App 64, 67-68 (4th Cir. 2006), the
11 appellate court found the district court erred in applying the murder cross-reference to the
12 defendant's sentence, because the murder was not charged in the indictment or found by
13 a jury beyond a reasonable doubt. Additionally, even if the court were to find that the
14 cross-reference applied, the court should depart downward because the cross-reference
15 results in (1) an enormous upward adjustment, (2) for uncharged conduct, (3) not proved
16 at trial, and (4) found by only a preponderance of the evidence; (5) and there is substantial
17 doubt as to the accuracy of the finding. *United States v. Murgas*, 321 F.Supp.2d 451,
18 455-56 (N.D.N.Y. 2004). There is no discussion that a co-defendant is guilty of murder
19 when his co-defendant is killed by a victim. In this case, Soofi and Simpson may have
20 been intending to kill others or they may have been intending to become martyrs - suicide
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1 by police.

2 At most, this was tantamount to attempted murder and § 2A2.1 (Assault with
3 Intent to Commit Murder) would apply which would result in a base level 27 or 33. Abdul
4 Kareem believes that the base level should be 26 plus the 2 point enhancement because
5 of weapons for a level 28.
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7 ¶43 **Adjustment for Role in the Offense**. Abdul Kareem did not commit a
8 crime of violence. In order to be a “crime of violence” it must be: “An offense that has
9 as an element the use, attempted use, or threatened use of physical force against the
10 person or property of another.” 18 U.S.C. § 16(a). In *Sessions v. Dimaya*, 138 S.Ct.
11 1204 (2018), the Supreme Court held that the residual clause for the definition of a
12 crime of violence (18 U.S.C. § 16(b)) is impermissibly vague in violation of the Due
13 Process Clause of the Fifth Amendment. Accordingly, to constitute a crime of violence
14 the offense must have an element of “use, attempted use, or threatened use of physical
15 force against the person or property of another.”
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18 Abdul Kareem stands convicted of four counts of the second superseding
19 indictment. Doc. 158. Count 3 alleges a false statement in violation of 18 U.S.C. §
20 1001. The instructions given the jury do not mention “the use, attempted use, or
21 threatened use of physical force.” See Doc. 287, Final Jury Instructions, p.23.
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1 First, on or about May 5, 2015, the defendant made a false statement to
2 the FBI, with all of you agreeing on the false statement he made;

3 Second, the defendant acted willfully; that is, the defendant acted
4 deliberately and with knowledge both that the statement was untrue and
5 that his conduct was unlawful; and

6 Third, the statement was material to the activities or decisions of the FBI;
7 that is, it had a natural tendency to influence, or was capable of
8 influencing, the agency's decisions or activities.

9 Doc. 287, Final Jury Instructions, p.23.

10 Similarly, Count 4, the felony in possession of a firearm on June 10, 2015
11 charge, does not have as an element “the use, attempted use, or threatened use of
12 physical force.” Doc. 158, p.5. The jury instructions make that clear:

13 First, on or about June 10, 2015, the defendant knowingly possessed a
14 Taurus model 85 Ultralite .38 caliber revolver and/or a Tanfoglio model
15 Witness 9mm pistol, with all of you agreeing on the particular firearm he
16 possessed;

17 Second, the Taurus model 85 Ultralite .38 caliber revolver and the
18 Tanfoglio model Witness 9 mm pistol had been shipped or transported
19 from one state to another state; and

20 Third, at the time the defendant possessed the Taurus model 85 Ultralite
21 .38 caliber revolver and/ or the Tanfoglio model Witness 9 mm pistol, the
22 defendant had been convicted of Aggravated Driving While Under the
23 Influence in the State of Arizona, a felony.

24 Doc. 287, p. 24.

1 Two counts (1 and 5) charge conspiracies. The gist of a conspiracy is the agreement, so
2 it is not surprising that the elements do not include the “use, attempted, or threatened
3 use of physical force.” The elements shared with the jury for Count 1 read, in pertinent
4 part:

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6 First, a person transported firearms and ammunition from one state to
7 another with the intent to commit murder and/or aggravated assault in
8 Texas, or with knowledge or reasonable cause to believe that murder
9 and/or aggravated assault would be committed with the firearms and
10 ammunition;

11 Second, the defendant aided, counseled, commanded, induced or procured
12 that person to transport firearms and ammunition in interstate commerce
13 with the intent to commit murder and/or aggravated assault;

14 Third, the defendant acted with the intent to facilitate transporting
15 firearms and ammunition in interstate commerce with the intent to
16 commit murder and/or aggravated assault; and

17 Fourth, the defendant acted before the crime was completed.

18 Doc. 287, p.19.

19 Count 5, conspiracy to provide material support to a designated terrorist
20 organization in violation of 18 U.S.C. 2339B does not necessarily involve the use of
21 force. The elements as contained in the jury instruction are:

22 First, beginning at an unknown time but no later than in or about June
23 2014,
24 and continuing through May 3, 2015, there was an agreement between
25 two or more persons to provide material support or resources to ISIL, a
26 designated foreign terrorist organization;

1 Second, the defendant became a member of the conspiracy knowing of its
2 unlawful object and intending to help accomplish it;

3 Third, ISIL was designated a foreign terrorist organization at the time of
4 the
5 conspiracy;

6 Fourth, the defendant knew that at least one of the following conditions
7 existed:

- 8 a. That ISIL was a designated foreign terrorist organization; or
9 b. That ISIL has engaged, or was engaging, in terrorist activity; or
10 c. That ISIL has engaged, or was engaging, in terrorism; and

11 Fifth, the offense occurred in whole, or in part, within the United States.

12 Doc.287, p.14.

13 At the outset, if an offense can be committed without use of force, it is not a
14 crime of violence. Courts use the categorical approach to determine whether an offense
15 is a crime of violence. *Borden v. United States*, 141 S.Ct. 1817, 1822 (2021). If even
16 the least culpable acts criminalized do not entail the requisite force, the statute of
17 conviction does not match the federal definition and so cannot serve as a crime of
18 violence. In *Borden*, supra, the Supreme Court decided whether the definition of a
19 violent crime includes offenses that criminalize reckless conduct. It held it does not.
20 141 S.Ct. at 1825. The government might argue that aggravated assault under Texas
21 law, V.T.C.A. Penal Code §22.01, requires the use of force. However, the definition of
22 assault provides, in pertinent part,
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1 was he seen with Simpson in the days leading up to the attack in Garland. Although
2 Abdul Kareem continues to deny any involvement, the court should make at least a two
3 level reduction.

4 ¶ 45 **Adjusted Offense Level (Subtotal)**. Abdul Kareem states that the Adjusted
5 Offense Level should be 28.

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7 ¶ 52 **Multiple Count Adjustment:**

8	<u>Group #</u>	<u>Adjusted Offense Levels</u>	<u>Units</u>
9	1	28	1.0
10	2	14	0.0

11 ¶ 53 **Greater of the Adjusted Offense Level Above**. The level should be 28.

12 ¶ 55 **Total Offense Level**. The level should be 28.

13 **Part B. Defendant's Criminal History.**

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15 ¶ 73 **Criminal Conduct** involved a civil dispute between Abdul Kareem and
16 Budget Truck Rental. The truck broke down and Abdul Kareem wanted Budget to tow
17 it in but Budget refused. There were never any criminal complaints filed to Abdul
18 Kareem's knowledge.

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20 **PART D – SENTENCING OPTIONS**

21 ¶ 92, Abdul Kareem believes that the total offense level should be 28 with a
22 criminal history of II and that the guidelines imprisonment range is 87-108 months.

1 **PART E: FACTORS THAT MAY WARRANT A SENTENCE OUTSIDE OF THE**
2 **ADVISORY GUIDELINE SYSTEM.**

3 **The Nature and Circumstances of the Offense Warrant a Downward**
4 **Departure or Variance.**

5 While Simpson and Soofi committed a serious crime, this Court should consider
6 the minimal role Abdul Kareem was found guilty of aiding and abetting a conspiracy.
7 Although Abdul Kareem continues to deny any involvement in the conspiracy, the jury
8 found him guilty.

9 Under 18 U.S.C. § 3553(a), the Court may consider factors not ordinarily deemed
10 relevant by the Sentencing Guidelines. *Gall v. United States*, 552 U.S. 38. In *Gall*, the
11 Court upheld a downward variance based in large part on withdrawal from the conspiracy
12 even though withdrawal from conspiracy is not a factor ordinarily considered under the
13 Guidelines. *Id.*

14 The most important and uncontroverted facts established at trial were that Abdul
15 Kareem did not travel to Garland, Texas nor did he participate in the attack. While the
16 attack was occurring, Abdul Kareem was 1,000 miles away working for his moving
17 business. While witnesses testified that Abdul Kareem had possible knowledge of
18 Simpson and Soofi's desire to do harm at the Draw Muhammad Contest, there was no
19 evidence that Abdul Kareem knew any details of the plan or took any steps to go to Texas
20 to participate in the attack. Additionally, even Stefen Verdugo testified that he talked
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1 Abdul Kareem out of going to Garland or participating in an assault at the Muhammad
2 Drawing Contest. DPSR ¶23. Abdul Kareem requests this Court consider this along with
3 his minor or minimal participation in the conspiracy as discussed early and grant a
4 downward variance in his sentence.
5

6 **The Nature of the Offense Falls Outside the Heartland of Cases to Which the**
7 **Federal Guideline Range Describes Therefore a Downward Departure is**
8 **Warranted.**

9 Abdul Kareem moves for a downward departure pursuant to 5K2.0(a)(2)A) and
10 (B), which provide that the Court can depart downward if there is a factor not adequately
11 taken into consideration by the Sentencing Commission or in exceptional cases in which
12 there is present a circumstance that the Sentencing Commission has not identified in the
13 guidelines but that nevertheless is relevant to determining the appropriate sentence.
14 Alternatively, he argues for being sentenced to the low end of the guideline range.
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16 Chapter 1, Part A(b) of the Federal Sentencing Guidelines Manual states that
17 sentencing courts are to treat each guideline as carving out a “heartland” which is a set of
18 typical cases embodying the conduct that the guideline describes. “When a court finds
19 an atypical case, one to which a particular guideline linguistically applies but where
20 conduct significantly differs from the norm, the court may consider whether a departure
21 is warranted.” Section 5K2.0(a)(4) states “a departure may be warranted in an
22 exceptional case, even though the circumstance that forms the basis for the departure is
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1 taken into consideration in determining the guideline range, if the court determines that
2 such circumstance is present in the offense to a degree substantially in excess of, or
3 substantially below, that which ordinarily is involved in that kind of an offense.”

4 The sentencing court may consider disregarding the Guidelines sentence where
5 the case falls outside the “heartland” to which the Commission intends individual
6 Guidelines to apply. *Rita v United States*, 551 U.S. 338, 351 (2007).

8 Here, the offense for which Abdul Kareem was convicted falls outside the
9 “heartland” of cases applicable to the guideline range. The instant case is extremely
10 unusual, in that Abdul Kareem has no ties to ISIS or any other terrorist organization. In
11 contrast to Simpson, there is no evidence that he communicated with anyone from ISIS
12 nor did he pledge allegiance to ISIS. Unlike Simpson, Abdul Kareem did not attempt to
13 travel to a foreign country to fight on behalf of a terrorist organization. Most importantly,
14 Abdul Kareem did not travel to Garland or participate in the Garland attack. Also, it
15 should be noted that since this trial we have learned that in the weeks leading up to the
16 Garland attack the FBI was monitoring and following Simpson. No evidence provided
17 by the FBI’s surveillance showed that Simpson and Abdul Kareem were even in contact.
18 Given the minimal and attenuated role that Abdul Kareem was convicted of playing in
19 the offense, this case falls outside the heartland to which Guidelines apply.
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1 **Harshness of Pretrial Confinement**

2 The Court should take into account that Abdul Kareem was subjected to solitary
3 confinement from the time he was arrested and charged through his trial; *i.e.*,
4 approximately ten (10) months. He was in a cell that was approximately 7 by 12 with a
5 bed on the ground and no chair. When he met with counsel, he had to sit on the floor
6 next to a grate in his jail door. He was not allowed outside or into an exercise facility
7 and did not have access to a TV, radio or other prisoners. The harshness of this
8 confinement should be taken into consideration in his sentencing. *United States v. Carty*,
9 264 F.3d 191 (2nd Cir. 2001); *United States v. Pressley*, 345 F.3d 1205 (11th Cir. 2003).
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11 **Justice and Fairness**

12 Lastly, judges are entitled to use their own sense of what is fair and just. *United*
13 *States v. Cruz-Rodriguez*, 541 F.3d 19 (1st Cir. 2008); and *United States v. Jones*, 460
14 F.3d 191 (2nd Cir. 2006). The judge can impose a non-guideline sentence when she
15 considers her own sense of what is fair and just as long as the judge considers the
16 sentencing factors outlined in section 3553(a). The historic role of sentencing judges is
17 to do what is fair and just subject to the reviewing court's ultimate authority to reject any
18 sentence that exceeds the bounds of reasonableness. In this case, the evidence was
19 conflicting. Abdul Kareem took the stand to explain what he had done and why and to
20 explain how certain things may have gotten into computers he owned because he
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1 permitted others to use them.

2 The climate in America is a very difficult one for American Muslims to get a fair
3 trial when they are accused of supporting terrorism, especially at the time of trial.
4 Admittedly, Simpson and Soofi did support terrorism. Soofi told his son of his support
5 of terrorism and his plan to go to Garland, Texas but he never mentioned that Abdul
6 Kareem was involved. Simpson and Soofi visited Abdul Kabir Wahid the night they left
7 for Garland and left an envelope for Saabir Nurse but they never mentioned Abdul
8 Kareem. There were no written messages, phone calls or texts to Abdul Kareem about
9 Garland. Although he has been convicted, the judge should decide what she believes is
10 a fair and just sentence under all of these circumstances.
11

12 **Conclusion**

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14 The DPSR writer has made factual determinations that are not supported by the
15 record and has added enhancements and upward departures that are not appropriate as
16 outlined above. Abdul Kareem will be filing a sentencing memorandum that will
17 elaborate on the arguments made in this memorandum in favor of a downward departure
18 and or a sentence outside the advisory Guideline System and address the sentencing
19 factors of 18 U.S.C. § 3553(a).
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RESPECTFULLY SUBMITTED this 8th day of October, 2021.

**MAYNARD CRONIN ERICKSON &
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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2021, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to CM/ECF registrants: AUSA Joseph E. Koehler and AUSA Kristen Brook. Additionally, a copy was served upon Mr. Abdul Kareem by first class letter, postage prepaid, at:

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/s/Rosalie Mobley
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